72-1273

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

JACK COHEN,

72-1273

Plaintiff-Petitioner,

vs.

FRANK MONGIARDO, Building Inspector of the Borough of West Paterson, PLANNING BOARD of the Borough of West Paterson, and MAYOR AND COUNCIL of the Borough of West Paterson,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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PETITION FOR WRIT OF CERTIORARI

The petition of Jack Cohen, plaintiff-petitioner, respectfully shows that:

OPINIONS BELOW

The unreported opinions of the Superior Court of New Jersey, Law Division, Passaic County, per Ciolino, J.D.C., temporarily assigned, and of the Superior Court of New Jersey, Appellate Division, are to be found at pages 1 and 5 of the appendix, infra.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry are October 26, 1972. Appendix, infra, page 5. The order of the Supreme Court denying certification was dated and entered January 18, 1973. Appendix, infra, page 7.

The statutory provision believed to confer on this Court jurisdiction to review the judgment is 28 U. S. C. A. 1257, 62 Stat. 929.

QUESTIONS PRESENTED FOR REVIEW

1. Because of the preponderance of nonconfirming uses in the industrial districts of West Paterson, is not Ordinance No. 69-15, the amending ordinance limiting all properties in said districts to industrial uses, wholly invalid, as violative of constitutional precept?

2. Because of the small dimensions of the premises in question, as truncated by the setback, rear-yard and parking requirements of Ordinance No. 69-15, and because said premises are economically unfit for industrial use and any other use is prohibited by the ordinance, does not the ordinance amount to confiscation in the name of zoning?

3. In view of the history of plaintiff's attempts to get action from the West Paterson authorities on his application for a gas station permit, in view of the prior existing ordinance prohibiting gas stations within 500 feet of each other, and in view of the passage and timing of Ordinance No. 69-14, the P. U. D. ordinance, in conjunction with the passage and timing of Ordinance No. 69-15, the amending industrial zone ordinance, and in conjunction with the plaintiff's initial litigation below, is it not judicially inferrible that the purpose of Ordinance No. 69-14, the P.U.D. ordinance, was to oppress and discriminate against the plaintiff and his property, rather than the purpose appearing on the face of the P. U. D. ordinance?

4. Did not the Law Division err in denying plaintiff's motion to resettle the terms of the judgment so as to embrace all issues raised in the case, including the validity of Ordinance No. 69-14, the P.U. D. ordinance?

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff acquired the premises in question, i.e., part of lot 11 on block 15 on the West Paterson assessment map, in January, 1968. It is located on Squirrelwood Road in West Paterson, bounded at one end by the southwesterly side-line of a one-way "off ramp" exit from the then proposed Interstate Route No. 80. See Description of Property, P-40, P68a; T11, T12, 10/5/71 transcript. The original size of the property was about 4 1/2 acres, but the State of New Jersery acquired all but 0.734 acres. (T11 to 13 and 37 to 39, 10/5/71 transcript; P-40, P68a).

The following photographs of the property as of the time of the trial in October, 1971 were received in evidence: P-42 (P111a) (T14 to 16, 10/5/71 transcript) shows the property and Squirrelwood Road. P-43 (112a) (T16, 17, 10/5/71 transcript) shows the property and the exit ramp of Route 80. P-44 (P1113a) (T17, 18, 10/5/71 transcript) shows the property and the interchange.

The plaintiff's purpose in acquiring the property was to utilize it for a gasoline service station. (T19, 20, 10/5/71 transcript.) The property was and is located in the industrial zone of West Paterson. At the time plaintiff purchased the property and until October 8, 1969, one of the many permitted uses in the industrial zone was that of a motor vehicle service station. (P-4, P53a—Ordinance No. 555, Section 8 (a); Section 7 (a) (2) (12).

There did exist, and still exists, a limitation on the location of service stations, particularly here pertinent, viz., Ordinance No. 61-14, Section 2 (H) (P-4, P53a), which provides, in part:

"No * * * motor vehicle service or filling station shall be erected * * * if any part of the land or premises in question is situated within a radius of 500 feet of the property line of:

* * *

"(H) Of any other gasoline, service or filling station existing in the Borough of West Paterson."

Shortly after plaintiff acquired the property, he submitted plans to the borough building inspector for the erection of a service station. (T20, 10/5/71 transcript) At that time, the building inspector told plaintiff he (the former) couldn't review the plans, and he referred the plans to the planning board, to whom they were referred. In response, plaintiff's attorneys received a letter dated March 19, 1968, from the planning board (P-45, P73a), stating the following, inter alia:

"We wish to advise that this Board has deferred the matter until such time as the roadways pertinent to construction of Rt 80 and the zoning scheme of the whole area has been defined."

At a meeting of the planning board on January 20, 1969, the following transpired (P-32, P82a):

Nathan Bernstein, 109 Wanaque Ave., Pompton Lakes—835-0660 was present, prepresenting Mr. Jack Cohen for the erection of a proposed gas station.

Mr. Condron advised that the Board has been in the process of reorganizing and has not had an opportunity to review. We will not act tonight.

Point to be considered:

Site plan approval of a road which has not been finalized by State Highway. Tying on to Boro facilities—water and sewer.

Mr. Bernstein—I have been told the new Squirrelwood Road has been finalized.

Mr. Condron—It is finalized but as far as existing, it is not.

It was agreed that this matter be set aside for the proper review and then would contact the applicant.

On February 20, 1969, the planning board wrote the following letter to counsel for the plaintiff (P-46, P85a):

"Plans as submitted, together with New Jersey State Right of Way map, loaned to the Board are returned to you herewith.

"The Board has met in work session and after deliberating

same, decided to take no action at this time. As was explained to you the matter at hand was accepted for discussion only, and not as a formal acceptance of the plans at our January meeting. The course of Route 80 has a lot of bearing upon decisions to be made concerning that particular area and until such time as plans are really finalized, no actions will be taken."

On February 20, 1969, the planning board wrote the following letter to counsel for the plaintiff (P-46, P85a):

"I acknowledge receipt of your letter of February 20, in connection with the application of our client, Mr. Jack Cohen, for a gas station site plan.

"You will recall that I was before your Planning Board in January of this year for the purpose of obtaining approval of his site plan. At the meeting, it was agreed that after the Planning Board had a work session after this meeting, the Board would meet with me informally to discuss this matter so that we could proceed with our application. It was never the intention of Mr. Cohen or myself to indicate that we did not want a formal acceptance or that our application was merely for the purpose of studying the situation.

"I call your attention that on January 24, 1969, I wrote to Mr. John Van Etveldt, who, I believe, is a member of your Board, in order to facilitate the matter. I never received a response from him as to this letter.

"I call your further attention to the fact that this matter has been pending since March 1968.

"You indicate in your letter that the course of Route 80 has a bearing on the decision to be made. In this connection, I call your attention to the fact that the plans for Route 80 have been finalized as they may affect our client's property. As a matter of fact, I understand that bids are soon to be received for the construction of the work.

"I further call your attention to the fact that your Board has approved a large complex near or opposite our client's

property and if that is the case, there is no reason why our client's matter should be held up.

"Accordingly, I am returning the site plans which were delivered to your Board at its January meeting, together with New Jersey State Right-of-Way Map. As to the latter, we understand that there has been no change whatsoever from the right-of-way map which is being returned.

"It is, therefore, necessary, that we receive a decision in this matter."

At a meeting of the planning board on March 17, 1969, the following transpired (P31, P89a);

COHEN GAS STATION

Mr. Condron read a letter, received from Mr. Bernstein, re site plan approval.

Mr. Papasavas—We don't have any guarantee that the latest highway map will be accurate. If this has been before the Board, since March, 1968, it came to us under a diferent name.

Mr. Condron will take care of this matter.

He never did nor did the planning board.

On August 13, 1969, the governing body of West Paterson adopted Ordinance No. 69-14 (P-3, P62a, recited in title of Ordinance No. 71-5; for provisions of 69-14, see P63a to 67a), the P. U. D. (Planned unit development) ordinance. For a delineation of the area to be developed, see subsection (C) of section 30, left half of P63a; see also P8a, north central portion of map, showing the proximity of the P. U. D. area to the plaintiff's crescent-shaped property. By virtue of section 5 of Ordinance No. 69-14 (P64a, top fourth of right half of page), one service station is permitted in the P. U. D. area, which could be erected within 500 feet of plaintiff's premises. See P8a, P53a.

At the same council meeting, on August 13, 1969 (-22, P96a), the following discussion of Ordinance No. 69-14 is noted in the minutes:

"Mr. George Van Hartogh, Attorney of 109 Wanaque Ave., Pompton Lakes noted he was representing Mr. Jack Cohen of

639 Stelton St., Teaneck, N.J. owner of a parcel of land between Squirrelwood Road and the proposed Route 80. He noted the ordinance was a very good one and well drafted, however, his point in question is Section 5 which allows one service station wherein his client owns industrial property southerly from Squirrelwood Road and there is another municipal ordinance which prohibits service stations within 500 feet. He noted his client is concerned as in January of 1968 he submitted site plans for a service station and received a letter on March 18th from the Planning Board deferring the matter which he felt was a reasonable consideration because of the roadway. He noted the roadway was then defined in January, 1969 and he resubmitted site plans on February 20th and again received a letter that the Board took no action on same. He noted he has again forwarded plans to the Building Inspector for a permit and that he feels that another service station might come in within the P. U. D. Ordinance within 500 feet of his property wherein he requested an amendment to this ordinance restricting any service station within 500 feet of his client's property. This point was then discussed at considerable length, with Mayor Baumann pointing out that as a member of the Planning Board the plans showed no road there at Mr. Cohen's service station at that time and there is no road. He noted there is a ramp proposed. Mayor Baumann stated the Borough originally felt there should be no service station within the P.U.D. Ordinance but they agreed to have only one because it was felt it would be an attendent and accessory use along with lodging facilities where people would stay overnight and have their automobiles attended to in the meantime and that is the only reason the Council has gone along with one service station on this plot and if it wishes to change then it is up to the Council to do so."

The complaint at bar was filed August 22, 1969. The answer thereto was filed September 11, 1969. On September 24, 1969, Ordinance No. 69-15, amending the zoning ordinance to exclude service stations from the industrial zone—see Section 8(I)—was passed at first reading (P-24, P102a), and was adopted October 8, 1969 (P-1, P61a). Furthermore, Section 8(A) of 69-15 provides:

"In Industrial Districts no building or premises shall be used,

and no building or other structure shall be built, altered or erected to be used for any purpose other than that of Industrial and Manufacturing purposes."

The premises in question are not readily usable for industrial purposes. (T108-15 to 25, 10/5/71 transcript) "(T)hat's largely based not only on the small size of the site, but on the revision of the zoning ordinance for setbacks, and rear yard and parking requirements." (T109-11 to 14, Id.) The court below added the following comments (T109-15 to 110-2, Id.):

> "THE COURT: You have a situation here where admittedly you have seven-tenths of an acre, which can be translated into *** 30,492 square feet. You have 204 feet frontage on Squirrelwood Road. Now, given the requirements established in the zoning regulations you would have to subtract from that 30,492 square feet, and you would have 12,240 feet for setbacks, which would leave you 18,252 square feet. You would have to subtract the additional 8,000 square feet for rear yard requirements, and that leaves you with (110) 9,652 square feet, and then under the zoning regulations for parking you would have to subtract an additional 4,826 square feet for parking which leaves you in the neighborhood of around the figure of slightly under 5,000 square feet of building area. Now, in these days of horizontal factory construction and extensive use rather than intensive use of factory space, it seems to me it's like looking for a needle in a haystack to find a manufacturing firm that's going to put up a 5,000 square foot building. It's not beyond the bounds of possibility, but it certainly would be exceptional."

Additionally, the amended industrial zone ordinance, 69-15, will have the effect of leaving a grossly preponderant number of existing nonconforming uses compared to existing industrial uses. See Exhibit P-67, P70a; also T73 to 75, 10/5/71 transcript. According to the exhibit, there are 25 industrial uses in the industrial zone. Opposed to that figure are 16 commercial uses and 59 residential uses, a total of 75 nonconforming uses. Moreover, of 16 vacant lots or tracts, one, of 10.16 acres, is school land; another, of 8.445 acres, is a bank under construction; and a third, 100x100 feet, is municipal land. Only 2 others are of substantial size, viz., 5.67 acres and 8.23 acres.

Most of the 11 others, which are noncontiguous, are probably too

small for industrial use, as witness:

0.67 acres
0.37 acres
1 acre
1 acre
100x150 feet
80x100 feet
78x100 feet
62x100 feet
61x100 feet
50x100 feet
25x100 feet

Prior to the adoption of 60-15, the aforesaid amendment limiting the industrial zone to industrial uses, the following uses were permitted in the industrial zone (Ordinance No. 555, Exhibit P-4, P53a): all 19 uses permitted in any of the business districts, including service stations, plus all uses permitted in any residence district, plus all other structures and uses except 8 that were specifically prohibited.

RAISING OF CONSTITUTIONAL QUESTION BELOW

In the plaintiff's contentions in the first pre-trial order in the trial court, the last paragraph states (P24a):

> "The ordinance (69-15) was under attack because it was not made for the benefit of the general public and was made for the purpose of preferring the owners of said premises and for the purpose of defeating plaintiff's application and does destroy plaintiff's property rights and constitutes a taking of plaintiff's property without due process of law and without compensation."

An order of the trial court amending the first count of the plaintiff's original complaint states, in part (P33a), that

> "The same is hereby amended to allege that Ordinance No. 69-14 of the Borough of West Paterson is void because the same is unreasonable, arbitrary, confiscatory and discriminatory."

Paragraph 7 of the second pretrial order in the trial court states, in part (P36a):

"7. Invalidity of Ordinance No. 69-15; invalidity of Ordinance No. 61-14; Ordinances Nos. 69-15, 61-14, and P.U.D. (69-14) are attacked because they are unreasonable, arbitrary, confiscatory, and discriminatory, and because they take property without due process and are not enacted under a comprehensive scheme and because they discriminate against the plaintiff; * * *."

The final portion of the opinion of the trial court (at page 4 of the appendix, infra) states:

"Reviewing the facts in this case with regard to the conditions which exist in the Borough of West Paterson as an entirety, this Court does find that the ordinance is certain in its terms, uniform and impartial in its operation and is not oppressive or in contravention of common rights and therefore not unreasonable, discriminatory, arbitrary nor confiscatory.

"Ordinance 69-15 is held valid."

In the judgment entered in the trial court, it is stated (P46a-20 to 47a-5) that

"the enactment of Ordinance No. 69-14, Ordinance No. 69-15 * * * of the Borough of West Paterson are not unreasonable, nor arbitrary, not confiscatory, nor discriminatory as they effect plaintiff's right to construct and use upon the plaintiff's premises as described in the complaint a gasoline service station and that the said ordinances were enacted under a comprehensive scheme and that the said Ordinance No. 69-15 was not enacted for the purpose of preventing the plaintiff from using his said premises as a gasoline service station and that there are no equities in favor of the plaintiff whereby the plaintiff is entitled to use his said premises as a gasoline service station."

The table of contents of the plaintiff's main brief in the Appellate Division below (which brief is part of the record transmitted to the Clerk of this Court) shows that the following points of argument were presented by the plaintiff on appeal:

"Point One: Because of the preponderance of nonconforming uses in the industrial districts of West Paterson, Ordinance No. 69-15, the amending ordinance limiting all properties in said districts to industrial uses, is wholly invalid, being violative of constitutional precept and the essential policy of the zoning statute.

"Point Two: Because of the small dimensions of the premises in question, as truncated by the setback, rear yard and parking requirements of Ordinance No. 69-15, said premises are economically unfit for industrial use, and any other use is prohibited by the ordinance. The ordinance amounts to confiscation in the name of zoning.

"Point Three: Ordinance No. 69-14, the P. U. D. ordinance, is invalid because its passage and timing were part of an attempt by the governing body, in conjunction with the passage and timing of Ordinance No. 69-15, the amending industrial zone ordinance, to oppress and discriminate against the plaintiff and his property.

"Point Four: The court below erred in denying plaintiff's motion to resettle the terms of the judgment so as to embrace all issues raised in the case, including the validity of Ordinance No. 69-14, the P. U. D.ordinance."

The second sentence of the first paragraph of the opinion of the Appellate Division (pages 5 and 6 of the appendix, infra) says:

"* * * We have reviewed the record and conclude that the judgment should be affirmed substantially for the reasons expressed in the opinion of Judge Ciolino in the Law Division."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is respectfully urged that it is about time for this Court to consent to review the validity of a presently-contemporary zoning ordinance in the aspect of whether such an ordinance is in violation of the due-process and equal-protection clauses of the Fourteenth Amendment. The issues presented in the following argument should be settled by this Court, with a salutary effect in many localities in the United States.

ARGUMENT

(Emphasis ours, unless otherwise noted)

POINT ONE: BECAUSE OF THE PREPONDERANCE OF NONCONFORMING USES IN THE INDUSTRIAL DISTRICTS OF WEST PATERSON, ORDINANCE NO. 69-15, THE AMENDING ORDINANCE LIMITING ALL PROPERTIES IN SAID DISTRICTS TO INDUSTRIAL USES, IS WHOLLY INVALID, BEING VIOLATIVE OF CONSTITUTIONAL PRECEPT.

As we have seen, P-67, supra, of 100 existing uses in the industrial districts of the borough, only 25 are industrial, the other 75 being divided into 16 commercial and 59 residential. Of the remaining 16 lots or tracts, all of which are vacant, perhaps 3 or 4 are available for industrial use and of dimensions adequate for such use. The raw fact is that there is very little room in any of the industrial districts for any further industrial development. In the totality of such a situation, it is therefore altogether farcical to impose an arbitrary restriction to industrial use exclusively.

"The nature of existing uses in a district and the marked tendencies therein should of course be reckoned with, when revising a zoning plan." **Bogert v Washington Twp.**, 45 N. J. Super. 13, 19 (A. D. 1957), affirmed 25 N. J. 57 (1957). "The essence of zoning is a territorial division in consonance with the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division." **Bogert v. Washington Twp., supra**, at page 61 of 25 N.J. "(T)he uses which, by whatever authority, exist in a neighborhood constitute a condition which must be considered in determining what inhibitions may be justly imposed against other properties within the neighborhood." **Bianchi v. Morey**, 128 N. J. L. 219, 221 (S. C. 1942).

As was said by the court in the case just cited, at the same page:

"* * * Our study of the proofs brings us to the conclusion that

the ordinance prohibition against the proposed use at the described location is, because of the special conditions, not within the supporting authority of the statute and if enforced would result in an unnecessary hardship; and that the zoning ordinance presents no bar to the issue of the inspector's permit."

And as was said in **Katobimar Realty Co. v. Webster**, 20 N. J. 114, 128, 129 (1955):

"* * * The inclusion of plaintiffs' lands in the industrial zone, barred to business, does not bear a real and substantial relation to the public health, safety, morals, comfort, convenience, or the general welfare, in the particulars laid down in R. S. 40:55-32, and so it is violative of constitutional precept and the essential policy of the statute. * * * It is not a reasonable regulation of the use of the individual property in the public interest as distinguished from an arbitrary interference with the basic right of private property. * * *

"(129) * * * We are here concerned with the exclusion of a retail commercial use from a light industrial zone, in an area where such use is in keeping with the environment, if not indeed with the permissible light industrial uses. This is not a question of 'liberal' zoning, but of zoning comporting with the constitutional rights of private property and the equal protection of the laws."

Here, too, the premises in question and their proposed use for a service station are in keeping with the existing commercial uses, if not with the permissible industrial uses. The mixed existing industrial and commercial uses at bar are as follows (P-67, P70a):

Texaco service station
Crane rental welding
Laundry
Carwash
Shopping center
Howard Johnson
A & P
Parking lot
Rubber factory

Beauty equipment (industrial)
Beauty equipment
Beauty equipment
Parking lot
Warehouse
Instrument specialty manufacturing
Junk yard
Water line (owned by Newark)
Teamster Union office building
Furniture factory
Movers; heavy equipment
Parts (tool) manufacturing
Aluminum products
Truck terminal
Sportswear manufacturing
Great Eastern shopping center
Car wash
Quanston Hut
King Parts warehouse
Gas station and service
100% office
Tavern
Garage, storage
Office and sales
Tavern
Parking lot
Parking lot
Dairy
Manufacturing
Office 50%
Industry
Office 50%
Office
Office 50%
Office 50%
New bank complex under construction
Tavern
Manufacturing
Vacant plant
Commercial (empty)
Pork store

A 5-year old commercial building

By reason of all of the foregoing, Ordinance No. 69-15 is therefore invalid as a whole, and not merely as to the plaintiff's property.

POINT TWO: BECAUSE OF THE SMALL DIMENSIONS OF THE PREMISES IN QUESTION, AS TRUNCATED BY THE SETBACK, REAR YARD AND PARKING REQUIREMENTS OF ORDINANCE NO. 69-15, SAID PREMISES ARE ECONOMICALLY UNFIT FOR INDUSTRIAL USE, AND ANY OTHER USE IS PROHIBITED BY THE ORDINANCE. THE ORDINANCE AMOUNTS TO CONFISCATION IN THE NAME OF ZONING.

As we have seen, the court below itself expounded in detail the practical inutility of the premises in question for industrial use (T109-15 to 110-12, 10/5/71 transcript). That is reason enough for this Court to nullify the ordinance as to plaintiff's property.

Where the effect of the regulation is to leave the property without any use to a property owner, such a restraint of all use "is patently confiscatory and thus beyond the police power and statutory authorization." **Bogert v. Washington Twp., supra,** at page 62 of 25 N. J., citing **Kozesnick v. Montgomery Township,** 24 N. J. 154, 182 (1957). "The same result ordinarily follows where the ordinance so restricts the use that the land cannot be practically utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible." **Morris County Land, etc. v. Parsippany-Troy Hills Tp.,** 40 N. J. 539, 557 (1963). "(A) zoning ordinance may be invalid in its impact upon a particular parcel, as where the parcel is zoned into idleness * * *." **Roman Catholic Diocese of Newark v. Ho-Ho-Kus Borough,** 47 N.J. 211, 216 (1966). "The only distinction between such zoning restriction and an actual taking by the municipality is that the restriction leaves the owner with the burden of paying taxes on the property, while the outright taking relieves him of that burden. Ordinarily restraint upon all practical use * * * is spoken of in terms of confiscation." **Harrington Glen, Inc. v. Mun. Bd. Adj. Bor. Leonia,** 52 N.J. 22, 29 (1968).

POINT THREE: ORDINANCE NO. 69-14, THE P. U. D. ORDINANCE, IS INVALID BECAUSE ITS PASSAGE AND TIMING WERE PART OF AN ATTEMPT BY THE GOVERNING BODY, IN CONJUNCTION WITH THE PASSAGE AND TIMING OF ORDINANCE NO. 69-15, THE AMENDING INDUSTRIAL ZONE ORDINANCE, TO OPPRESS AND DISCRIMINATE AGAINST THE PLAINTIFF AND HIS PROPERTY.

It is true that, in the case of an attack on an ordinance which is valid on its face, inquiry into legislative motivation is prohibited, absent a showing of fraud, personal interest or corruption, none of which is charged here. "But that rule does not bar * * * a judicial inquiry into the purpose of the ordinance." **Wital Corp. v. Denville**, 93 N. J. Super. 107, 110, 111 (A. D. 1966). (Emphasis by the Court) The courts may inquire into the motives of the legislators in passing enactments "as they may be disclosed on the face of the acts, or **inferrible from their operation**, considered with reference to the **condition of the country and existing legislation.** The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." **Soon Hing v. Crowley**, 113 U. S. 703, 710 (1985). Motives of a municipal legislative body may be the subject of inquiry in determining the validity of legislation where the motivation is disclosed on the face of the act, assimilable to a declaration of legislative intent, or as a part of legislative proceedings. **De Sena v. Gulde**, 24 A. D. 2d 165, 265 N. Y. S. 2d 239 (1965). "The court looks behind the form of the ordinance to determine its intended purpose or effect, and where an ordinance in legal form cloaks an illegal purpose and produces an illegal result the courts have said that the ordinance is not adopted in 'good faith' and has no effect." **Wipfler v. Klebes**, 284 N. Y. 248, 30 N. E. 2d 581 (1940). See, also, **Kissinger v. City of Los Angeles**, 327 P.2d 10 (Cal. App. 1958). The motives of members of a city council in the enactment of an ordinance of strictly legislative nature can be judicially inquired into as such motives may be disclosed on the face of the particular act in question or by reference to general existing conditions or other legislative acts. **Oscar P. Gustafson Co. v. City of Minneapolis**, 42 N. W. 2d 809 (Sup. Ct. of Minn. 1950). If a law, ordinance or resolution shows on its face or in its results an improper purpose, motive or intent, thereby causing damage to a person, a court can inquire into the motives behind such act. **Trujillo v. City of**

Los Angeles, 81 Cal. Rptr. 146 (Cal. App. 1969). Where spot zoning or other restriction upon a particular property evinces a discriminatory design against the property user, the courts will give weight to evidence disclosing a purpose other than that appearing upon the face of the regulation. **G & D Holland Construction Co. v. City of Marysville, 12 Cal. App.** 3d 989, 91 **Cal. Rptr.** 227 (1970).

"The condition of the country," **Soon Hing v. Crowley, supra,** "the general existing conditions," **Oscar P. Gustafson Co. v. City of Minneapolis, supra,** prior to the enactment of the P.U.D. ordinance at bar, were there: Shortly after plaintiff acquired the premises in question, which was located adjacent to a ramp exit from the then proposed Interstate Route No. 80, he submitted plans to the borough building inspector for the erection of a service station. The latter left a review of the plans up to the planning board, to whom they were referred. On March 19, 1968, the planning board's response by letter was (P45, P73a);

> "We wish to advise that this Board has deferred the matter until such time as the roadways pertinent to construction of Rt 80 and the zoning sceme of the whole area has been defined."

At a meeting of the planning board on January 20, 1969 (P32, P82a), counsel for plaintiff was told that the new Squirrelwood Road "is finalized but as far as existing, it is not." "It was agreed that this matter be set aside for the proper review and then would contact the applicant."

On February 20, 1969, the planning board returned the plans to counsel for the plaintiff, saying in its transmitting letter (P46, P85a):

> "* * * The course of Route 80 has a lot of bearing upon decisions to be made concerning that particular area and until such time as plans are really finalized, no action will be taken."

It should be borne in mind that, since the original submission of the plans to the planning board in March, 1968, the plaintiff was entitled to a permit for the erection of a service station under the existing ordinance, and the planning board had never rejected the submitted plans as being defective in form, content or substance.

On February 28, 1969, plaintiff's attorneys resubmitted the plans to the planning board. (P53, P86a)

On March 17, 1969, at a meeting of the planning board, the following statement was made on its behalf (P31, P89a)

"* * * We don't have any guarantee that the latest highway map will be accurate. If this has been before the Board, since March, 1968, it came to us under a different name.

(That was definitely not so.)

"Mr. Condron will take care of this matter." He never did, nor did the planning board.

On August 13, 1969, as of which time the planning board had still not taken care "of this matter," the governing body adopted Ordinance No. 69-14, the P. U. D. Ordinance (P-3; P63a to 67a), creating the planned unit development area right next door to plaintiff's property (P8a; P63a (C) "DELINEATION OF AREA"), permitting one service station (P64a, top fourth of right half of page) in the industrial and commercial zone created by the new ordinance (P63a(A) "PURPOSES AND OBJECTIVES OF DEVELOPMENT"). It is plain, from the adjacency of plaintiff's property to the new P. U. D. area, that a service station could be erected therein within 500 feet from the plaintiff's property. It cannot be assumed that the governing body did not know of the existing ordinance, No. 61-14 (P-4, P53a), Section 2 (H) of which prohibited the erection of any service station within a radius of 500 feet of the property line of any other service station. Nor can it be assumed that the governing body was ignorant of the delay by the planning board since March, 1968 in acting upon plaintiff's submission of plans for the erection of a service station adjacent to the P. U. D. area.

It is true that the legislative function of fixing the precise boundary lines of the P. U. D. area at bar "belongs to the governing body * * *, not the court, absent a clear showing of caprice or arbitrariness." **Finn v. Wayne Tp., 53 N. J. Super. 405, 413 (A. D. 1950).** But here we do have a clear showing of caprice or arbitrariness in passing the P. U. D. ordinance, for the governing body was not through yet in dealing with the plaintiff's property. When they were confronted with the complaint at bar, which was filed August 22, 1969, complaining of the P. U. D. ordinance, they filed an answer on September 11, 1969, and then, 13 days after that, they passed at first reading the real blockbuster, Ordinance No. 69-15 (the P. U. D. ordinance was 69-14, remember). Now they really tied up plaintiff's application for a service station building permit. Notwithstanding that in the P. U. D. area, an industrial and commercial area, they

had permitted a service station that could be erected within 500 feet from or next door to plaintiff's property, they enacted, in 69-15, a wholly inane ordinance limiting all properties in the industrial districts to an exclusively industrial use, specifically prohibiting service stations therein, and making it impossible for plaintiff to build anything on his property but an accumulation of taxes.

The motive of the governing body in passing Ordinances Nos. 69-14 and 69-15 was to oppress and discriminate against plaintiff and his property. That motive is inferable from the operation of 69-14 and 69-15, considered with reference to the existing legislation, i. e., Ordinance No. 61-14 (the 500 foot limitation). The natural and reasonable effect of 69-14 and 69-15 was to place every conceivable obstacle in the path of the plaintiff in attempting to get a service station building permit. That effect is therefore presumed to be the purpose of the governing body and, so their motive. **Soon Hing v. Crowley, supra.** They don't have to say so on the face of the 2 ordinances. Actions, and their effects, speak louder than words. Such actions were "assimilable to a declaration of legislative intent," and each ordinance was part of an integrated legislative whole. **De Sena v. Gulde, supra.** The 2 ordinances produced an illegal result, for 69-14 cannot be truly divorced from the unconstitutional 69-15 that followed it inexorably, in point of time and intent. Those 2 ordinances showed in their results an improper purpose, causing damage to the plaintiff. **Trujillo v. City of Los Angeles, supra.**

CONCLUSION

It is therfore respectfully urged that the foregoing petition be granted.

Respectfully submitted,

SLINGLAND, BERNSTEIN & VanHARTOGH
Attorneys for Plaintiff- Petitioner,

By: Nathan Bernstein
A Member of the Firm.

SAM WEISS,
Of Counsel.

APPENDIX
TRIAL COURT OPINION

November 19, 1971

Nathan Bernstein, Esq.,
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J. Mortimer Rubenstein, Esq.,
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Attorneys for Defendant
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Re: Cohen v. Mongiardo, et al
Docket No. L-41004-68 P.W.

Gentlemen:

This action, in lieu of prerogative writ, was brought by plaintiff challenging Borough of West Paterson Ordinance 69-15 adopted October 8, 1969 as being discriminatory, unreasonable, arbitrary, confiscatory and not enacted under a comprehensive scheme. The Ordinance 69-15 is an amendment to the Borough's Zoning Orinance adopted August 11, 1954 and amends that section dealing with industrial districts. The amendment provides for permitted uses as follows: "In industrial districts no building or premises shall be used and no building or other structure shall be built, altered or erected to be used for any purpose other than that of industrial and manufacturing purposes." The offending section as pertains to the plaintiff in this action appears further under prohibited uses, Section (I), wherein motor vehicle service stations are excluded. Plaintiff's counsel concedes that Ordinance 69-15 was duly enacted and published and that this ordinance binds the

land. **Hohl v. Readington Tp.**, 37 N.J. 271 (1962).

The following findings of fact are made: At trial it was revealed that the plaintiff acquired 4.5 acres of industrial zoned land in the Borough of West Paterson in January 1968. At the time of acquisition he was aware that a portion of the property would be lost through condemnation to the State of New Jersey for the Route 80 right-of-way and plaintiff knew that the remaining land would amount to .73 acres. This remaining parcel fronts both Squirrelwood Road and the exit ramp of Route 80.

On March 6, 1968 plaintiff submitted a service station site plan to the Borough Building Inspector, which plans were in turn referred to the Planning Board. On March 19, 1968 the Planning Board, by letter to plaintiff's counsel, advised that action on the matter was deferred "until such time as the roadways pertinent to construction of Route 80 and the zoning scheme of the whole area has been defined. "On January 24, 1969, plaintiff again submitted a plat to the Planning Board and by letter of February 20, 1969, the Board returned them to the plaintiff's counsel stating no action would be taken until the plans for Route 80 were finalized. The Court finds that no other applications were made by the plaintiff to any other board or body of the Borough of West Paterson and no evidence was presented at trial which would indicate that plaintiff attempted to secure a variance by application to the Board of Adjustment.

In August 1969, the plaintiff commenced this action and following the enactment of Ordinance 69-15, amended its pleadings to include the present attack upon the ordinance. By consent of counsel in this matter, the litigation was confined to the question of the constitutionality of Ordinance 69-15.

At trial, plaintiff called Ralph M. Field, a planning consultant, to testify. He testified as to his familiarity with the Borough, the property in question and the ordinance in question. He stated that Ordinance 69-15 did not provide for any commercial uses and in his opinion it was unusual and unreasonable to prohibit service stations throughout the entire industrial zone of the Borough. He further testified that this ordinance rendered some major ratables as nonconforming uses. He did, however, concede that it is proper planning to limit uses to a particular district and that it is good planning procedure to alter zoning

with the passage of time. Arthur T. Riedel testified for the plaintiff as an expert witness in the field of real estate appraisal. He stated there are seven industrial areas in the Borough and that three service stations exist in these areas. He offered the opinion that the value of industrial land which restricts commercial uses is reduced in value as compared with industrial land which also permits commercial uses.

The defendant offered John A. Lacz, a licensed planning, professional engineer and municipal planner, as its expert. His opinion was that Ordinance 69-15 was not ambiguous, was good planning in localizing all industry in selected areas, and reasonable in excluding all uses from industrial zone except industry. He further testified that the exclusion of service stations from the industrial zone was not unreasonable and was accepted planning. Mayor Alfred Baumann of West Paterson testified that the reason for Ordinance 69-15 was to broaden the municipality's tax base.

At the outset, attention is drawn to the narrow limit of the judicial role in reviewing zoning ordinance. A strong presumption exists in favor of validity and provisions thereof cannot be invalidated unless the presumption is overcome by a clear showing that it is arbitrary and unreasonable.

Harvard Enterprises, Inc. v. Board of Adjustment, Township of Madison, 56 N.J. 362, (1970); Morris v. Potsma, 41 N.J. 354, 359 (1964); Zampieri v. River Vale Tp., 29 N.J. 599, 605-606 (1959).

The statutory considerations in this area are found in N.J.S.A. 40:55-32 and the statute imparts the essential considerations of zoning. One such consideration is that: "Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view of conserving the value of property and encouraging the most appropriate use of land throughout the municipality."

A zoning ordinance, properly adopted, which is reasonably designed by whatever means, to further the advancement of a community as a social, political and economic unit, is deemed to be in the general welfare and thus a proper exercise of the police power. **Schmidt v. Board of Adjustment of City of Newark, 9 N.J. 405 (1952).** A zoning ordinance must relate to the public health, morals and general welfare

of the community, and in determining whether or not there is a substantial relation between the ordinance and these factors the ordinance must be examined in light of existing circumstances in the community, and in determining the question of reasonableness cognizance must be taken of the problem to be solved by the municipality. **State v. Mundet Cork Corp.**, 8 N.J. 359 (1952). The Court finds that as a matter of fact that the Borough Council in establishing Ordinance 69-15 was furthering a legitimate plan for zoning in the Borough and was contemplating the elimination of a patchwork zoning scheme. The Appellate Courts of the State of New Jersey have held this type of amendment to the zoning ordinance is not legally objectionable. **Ward v. Twp. of Montgomery**, 28 N.J. 529, 535 (1959).

The validity of a zoning ordinance is not to be determined by reference to an individual parcel of land. **Fisher v. Township of Bedminster**, 11 N.J. 194 (1952). Zoning must serve the long-range needs of the future as well as the needs of the present and the reasonably foreseeable future. **Vickers v. Twp. Committee of Gloucester Twp.**, 37 N.J. 232 250 (1962). It is not unreasonable to anticipate that industry, creating new ratables, may be encouraged by sound planning to favorably look to this area for plant sites. Unless there is planning, the Borough may suffer from mixed property uses which could discourage industry from settling.

Zoning authorities may consider, along with other valid reasons when enacting a zoning plan, the effect of tax revenues. **Gruber v. Mayor and Twp. Commmittee of Raritan Twp.**, 39 N.J. 1, 9-11 (1962).

Reviewing the facts in this case with regard to the conditions which exist in the Borough of West Paterson as an entirety, this Court does find that the ordinance is certain in its terms, uniform and impartial in its operation and is not oppressive or in contravention of common rights and therefore not unreasonable, discriminatory, arbitrary nor confiscatory.

Ordinance 69-15 is held valid.

Very truly yours,

Peter Ciolino, J.D.C. t/a

OPINION AND JUDGMENT
NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1281-71

JACK COHEN,

Plaintiff-Appellant,

v.

FRANK MONGIARDO, Building Inspector of the Borough of West Paterson, PLANNING BOARD OF THE BOROUGH OF WEST PATERSON, and MAYOR AND COUNCIL OF THE BOROUGH OF WEST PATERSON,

Defendants-Respondents.

Argued October 16, 1972 — Decided October 26, 1972.

Before Judges Collester, Leonard and Halpern.

On appeal from the Superior Court, Law Division, Passaic County.

Mr. Sam Weiss argued the cause for appellant (Messrs. Slingland, Bernstein & Van Hartogh, attorneys)

Mr. Philip H. Mizzone, Jr., Municipal Attorney, argued the cause for respondents.

PER CURIAM

Plaintiff appeals from a judgment entered in a proceeding in lieu of prerogative writs upholding the validity of Ordinance No. 69-15 of the Borough of West Paterson which prohibited gasoline service stations in industrial zones. We have reviewed the record and

conclude that the judgment should be affirmed substantially for the reasons expressed in the opinion of Judge Ciolino in the Law Division.

We find no error in the trial court's refusal to resettle the terms of the judgment to include the issue of invalidity of Ordinance No. 69-14 because the record indicates that the only issue tried below was the alleged invalidity of Ordinance No. 69-15.

Affirmed.

SUPREME COURT OF NEW JERSEY
C-188 SEPTEMBER TERM 1972

Jack Cohen,
Plaintiff-Petitioner,'
vs.
Frank Mongiardo, et als.,
Defendants-Respondents.

To Appellate Division, Superior:

A petition for certification having been submitted to this Court, and the Court having considered the same.

It is hereupon Ordered that the petition for certification is denied,w with costs.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 18th day of January, 1973.

Acting Clerk